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Maureen D. Smith
(Of Counsel)

February 12, 2009

Via U.S. Mail

Thomas S. Burack, Chairman
NH Site Evaluation Committee
c/o NH Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

***Re: Docket No. 2008-04 - Application of Granite Reliable Power,
LLC for a Certificate of Site and Facility for the Granite Reliable
Power Wind Park in Coos County***

Dear Chairman Burack:

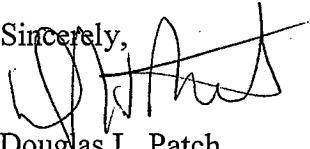
Enclosed for filing with the Site Evaluation Committee in the above-captioned matter please find an original and 9 copies of the "Applicant's Contested Motion to Strike Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department" and an original and 9 copies of the "Applicant's Contested Motion *In Limine* Regarding Testimony, Comments, Reports and Any Other Evidence Concerning Matters Relating to the Provisions of RSA 212-A".

The Applicant respectfully requests that orders on these motions be issued as soon as possible after the 10 day objection period contained in N.H. Admin. Rule Site 202.14 (f) has run. A prompt ruling on these motions will promote the orderly conduct of the proceedings as it will provide guidance to the subcommittee members and the parties on the scope of the adjudicative hearings and therefore will enable everyone to prepare for the hearings accordingly.

Thank you for your assistance and cooperation. Please let me know if you have any questions.

Thomas S. Burack, Chairman
February 12, 2009
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Sincerely,



Douglas L. Patch

cc. Service List
Enclosures
537232_1.DOC

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2008-04

**RE: APPLICATION OF GRANITE RELIABLE POWER, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
TO CONSTRUCT AND OPERATE
THE GRANITE RELIABLE POWER WINDPARK**

**APPLICANT'S CONTESTED MOTION TO STRIKE PREFILED TESTIMONY
OF WILL STAATS AND JILLIAN KELLY ON BEHALF OF
THE NEW HAMPSHIRE FISH AND GAME DEPARTMENT**

NOW COMES Granite Reliable Power, LLC ("GRP" or "the Applicant"), by and through its undersigned attorneys, and respectfully moves the New Hampshire Site Evaluation Committee ("SEC" or "Committee"¹) to strike the prefiled testimony of Will Staats and Jillian Kelly submitted on behalf of the New Hampshire Fish and Game Department. In support of this Motion, the Applicant states as follows:

1. On December 19, 2008, the New Hampshire Fish and Game Department ("Fish and Game") submitted the joint prefiled testimony of Will Staats and Jillian Kelly ("prefiled testimony") in the above-captioned matter. The cover letter to the prefiled testimony asserts that the SEC "has an independent responsibility to comply with RSA 212-A:9, III.". The cover letter also states that Fish and Game "expects that the enclosed testimony will be vital in the Subcommittee's determination of the effect of this proposal

¹ As used herein, the terms "SEC" and the "Committee" are also intended to refer to the Subcommittee appointed under RSA 162-H:4, V. (b) to consider GRP's Application for a renewable energy facility.

on endangered and threatened species in the state, pursuant to RSA Chapter 212-A”.

Letter of Carol B. Henderson to Thomas S. Burack, Chairman, December 19, 2008.

2. The above-referenced prefiled testimony is improper for various procedural and substantive reasons discussed below:

A. Under RSA 162-H:6-a, VI., only those agencies “with jurisdiction” are authorized to provide testimony and evidence to the SEC in adjudicative hearings relating to renewable energy facilities. While the term “agencies with jurisdiction” is not defined in RSA 162-H, the phrase “state agencies having jurisdiction, under state or federal law, **to regulate the construction or operation of the proposed facility**” appears twice in RSA 162-H:6-a, I. (Emphasis added.) Thus, it is logical to conclude that the subsequent reference to “agencies with jurisdiction” appearing in RSA 162-H:6-a, VII. refers back to the earlier phrase “state agencies having jurisdiction, under state or federal law, to regulate the construction or operation of the proposed facility...”. That interpretation is reasonable given that these are the agencies that are required to receive copies of the SEC application, as well as testimony, exhibits and sufficient information to satisfy their individual application requirements, including completed application forms. *See* RSA 162-H:6-a, I. Absent the SEC process, these are the agencies (e.g. Department of Environmental Services) that would be issuing individual permits pursuant to their particular permitting processes. As the Committee is aware, these agencies (i.e. “agencies with jurisdiction”) and their representatives do not submit prefiled testimony with the Committee. Rather, they provide reports to the Committee. *See* RSAs 162-H:6-a, V. and VI. In fact, such final reports were filed by the Department of Environmental Services on February 10, 2009. The Fish and Game Department, by contrast, has no

jurisdiction, under state or federal law, to regulate the construction or operation of a renewable energy facility. Therefore, because it lacks status as an agency "with jurisdiction", Fish and Game is not authorized to provide testimony or evidence in connection with the adjudication of GRP's application.

B. The submission of Fish and Game's prefiled testimony and the filing of its counsel's appearance pursuant to N.H. Admin. Rule 202.04 (which governs a party's or a party's representative's appearance) evidence Fish and Game's intent to participate in these proceedings as a party and in an advocacy/adversarial role. Such participation is impermissible as it is totally inconsistent with the statutory scheme of RSA 162-H as well as the Committee rules which state that Staff "shall participate in adjudicative proceedings on an advisory basis". N.H. Admin. Rule Site 202.05 (a). Significantly, no employees of any other state agencies have submitted prefiled testimony in the instant proceeding, presumably because they are adhering to the provisions of RSA 162-H, the above-referenced rule and long-standing agency practice of providing reports to the Committee.

C. As explained above, Fish and Game does not have standing to present testimony or evidence in this case. Thus, if it wishes to participate as a party to these proceedings, it must request the Committee's permission to intervene under RSA 541-A:32. However, Fish and Game has not sought permission from the Committee for its late-filed appearance or its intervention in the above-captioned proceeding. The Committee's Order and Notice of Public Information Hearing, Site Inspection Visit and Pre-Hearing Conference dated August 27, 2008 established September 18, 2008 as the deadline for motions to intervene. Three months later, on December 19, 2008, Fish and

Game submitted its prefiled testimony, and on December 22, 2008, Fish and Game's attorney filed an Appearance "as counsel for the New Hampshire State Agency of Fish and Game Department". The fact that Fish and Game is a state agency does not enable it to ignore, violate or otherwise avoid the rules and statutes that apply to the SEC process or the orders governing the schedule of the instant docket.

D. Fish and Game's reliance on RSA 212-A:9, III. as authority for its ability to submit prefiled testimony in this proceeding is misplaced. Fish and Game asserts that it is authorized to review this project and offer comments pursuant to RSA 212-A:9. *Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department*, p. 5, lines 10-11. RSA 212-A:9, III. provides, in pertinent part as follows:

All other state departments and agencies, to the extent possible, consistent with their authorities and responsibilities, shall assist and cooperate with the executive director in furtherance of the purposes of this chapter for the conservation of endangered or threatened species. They shall take such action as is reasonable and prudent to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such species or result in the destruction or modification of habitat of such species **which is determined by the executive director to be critical.**

To the extent that Fish and Game relies on RSA 212-A:9, III. for the proposition that the SEC must consider the prefiled testimony regarding the project's effect on endangered or threatened species, that argument must fail in light of RSA 212-A:13, III. which provides that none of the provisions of RSA 212-A, nor any rule promulgated under that chapter, shall "in any way" interfere "with the siting or construction of "any energy facility as defined in RSA 162-H:2". The mere filing of Fish and Game's prefiled testimony constitutes interference of the type that is prohibited by RSA 212-A:13, III. In addition to that procedural interference, the substance of Fish and Game's prefiled

testimony constitutes interference within the meaning of RSA 212-A:13, III. Because Fish and Game has prefiled testimony pursuant to its perceived authority under RSA 212-A, and because that testimony is adverse to (and therefore interferes with) GRP's position, interests and plans to construct "any energy facility as defined in RSA 162-H:2" (i.e. a renewable energy facility defined in RSA 162-H:2, XII.), the prefiled testimony is clearly prohibited by RSA 212-A:13, III. and therefore must be stricken from the record of this proceeding.

In addition, notwithstanding its invocation of RSA 212-A:9, III., Fish and Game's testimony admits that "critical habitat has not been defined or designated for any species in New Hampshire." *Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department*, p. 5, lines 17-18. Thus, to the extent that Fish and Game asserts that the SEC must consider the prefiled testimony regarding the GRP project's effect on certain wildlife habitat, that argument is totally undercut by Fish and Game's own admission that the executive director has not made a determination under RSA 212-A:9, III. that such habitat is "critical".

3. Under RSA 541-A:33, II., the presiding officer may exclude irrelevant and immaterial evidence from the record of an administrative proceeding. The information contained in Fish and Game's prefiled testimony is irrelevant and immaterial as a matter of law given the provisions of RSA 212-A:13, III. Accordingly, it should be stricken from the record in this case.

4. Pursuant to N.H. Admin. Rule Site 202.14 (d) and (e), on February 11, 2009, Attorney Douglas Patch forwarded a draft copy of this motion by electronic mail to the parties in this proceeding in an effort to obtain concurrence with the relief sought herein.

The following responses to the request for concurrence were received prior to the filing of the within motion: Ms. Lisa Linowes, on behalf of Industrial Wind Action Group, indicated that she does not support the motion as presented; Counsel for the Public, Senior Assistant Attorney General Peter Roth indicated that he does not concur with the motion; Assistant Attorney General Evan Mulholland, on behalf of the New Hampshire Fish and Game Department, indicated that he did not consent and will be filing an objection to the motion; Intervenor Kathlyn Keene indicated that she does not concur with the motion; and Dr. David Publicover, on behalf of Appalachian Mountain club indicated that he does not concur with the motion. The remaining parties did not respond to Attorney Patch's electronic mail message prior to the filing of the within motion.

WHEREFORE, in view of the foregoing, the Applicant respectfully requests that this honorable Committee:

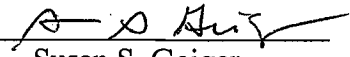
A. Strike from the record of this proceeding the prefiled testimony of Will Staats and Jillian Kelly on Behalf of the New Hampshire Fish and Game Department;

B. Order that neither the New Hampshire Fish and Game Department nor any of its employees or representatives may present testimony or evidence at the adjudicative hearings; and

C. Order such further relief as it deems appropriate.

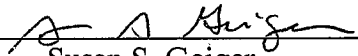
Respectfully submitted,
Granite Reliable Power, LLC
By and through its attorneys,
ORR & RENO, P.A.

Dated: February 12, 2009

By: 
Susan S. Geiger
Orr & Reno, P.A.
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Certificate of Service

I hereby certify that on this 12th day of February, 2009, copies of the within Motion were sent by electronic mail or U.S. mail, postage prepaid to the Service List.


Susan S. Geiger

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